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No. 99-5153

Supreme Court, U.S.
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In The

Supreme Court of the United States

CORNELL JOHNSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF *AMICUS CURIAE* OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND THE ASSOCIATION OF FEDERAL DEFENDERS IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the imposition of a renewed term of supervised release following revocation of an earlier term of such release violates the *Ex Post Facto* Clause of the Constitution (Art. I, §9, Cl. 3) where the statute in effect at the time of petitioner's original offense did not provide for such a renewed term.

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BRIEF *AMICUS CURIAE* OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND THE ASSOCIATION OF FEDERAL DEFENDERS IN SUPPORT OF PETITIONER

INTEREST OF *AMICI*

The National Association of Criminal Defense Lawyers is a District of Columbia non-profit corporation with a membership of more than 10,000 attorneys nationwide – along with 80 state and local affiliate organizations numbering 28,000 members in fifty states. NACDL was founded in 1958 to promote study and research in the field of criminal law and procedure, to disseminate and advance knowledge of the law in the area of criminal justice and practice, and to encourage the integrity, independence and expertise of defense lawyers in criminal cases in the state and federal courts. Foremost among NACDL's objectives is to promote the proper administration of justice. It has appeared before this Court as *amicus curiae* on numerous occasions. *See, e.g., Jones v. United States*, 119 S.Ct. 1215 (1999).

The Association of Federal Defenders was formed in 1995 to enhance the representation provided under the Criminal Justice Act (18 U.S.C. §3006A) and the Sixth Amendment to the Constitution of the United States. It is a non-profit volunteer organization whose membership includes attorneys and support staff of Federal Defender offices nationwide. One of AFD's missions is to file *amicus curiae* briefs to ensure that the position of indigent defendants in the criminal justice system is properly represented.[1]

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[1] Both parties have consented to the appearance of NACDL and AFD as *amicus curiae* in this matter. No counsel for any party has authored this brief in whole or in part, and no person or entity, other than *amici*, has made a monetary contribution to the preparation or submission of this brief. Sup. Ct. Rule 37.6.

STATEMENT OF THE CASE

On March 8, 1994, petitioner Cornell Johnson was convicted upon his guilty plea to one count of conspiring to defraud, produce, use and traffic in a counterfeit access device, in violation of 18 U.S.C. §1029(b)(2). This offense is classified as a Class D felony under 18 U.S.C. §3559(a)(4). Petitioner was sentenced to 25 months' imprisonment, to be followed by three years' supervised release. Pet. App. 1a.

After his release from imprisonment and while on supervised release, petitioner left the judicial district without permission and committed various state-law offenses in Virginia. The district court revoked petitioner's supervised release and ordered him reincarcerated for 18 months, to be followed by a renewed term of 12 months' supervised release. *Id.*

At the time of petitioner's original offense, violations of supervised release were governed by 18 U.S.C. §3583(e), which provided that, upon an offender's violation of supervised release, the district court was authorized to "revoke a term of supervised release, and require the person to serve in prison all or part of the term of supervised release without credit for time previously served on post-release supervision." Section 3583(e)(3).[2]

Effective September 13, 1994 – after petitioner committed the underlying offenses for which he was

[2] The courts of appeals reached conflicting views as to whether the statute authorized a district court to order an offender who violated supervised release to serve a combined term of reimprisonment and renewed supervised release. Nine of eleven circuits determined that the district court was limited to imposing only a new term of imprisonment. *See* cases collected at Cert. Opp. 3 & n.2. As noted *infra*, this statutory ambiguity was corrected by the subsequent enactment of §3583(h).

convicted, but before he violated the terms of his supervised release – Congress enacted 18 U.S.C. §3583(h).[3] Subsection (h) made clear that, when a defendant's term of supervised release is revoked and he is ordered to serve a term of reimprisonment, the district court may now also impose a renewed term of supervised release after the completion of reimprisonment. For these purposes, the defendant is not entitled to any credit for the time spent on the original supervised release term before it was revoked. 18 U.S.C. §3583(e)(3) and (h).

The court of appeals affirmed the revocation of petitioner's supervised release, rejecting his argument that the application of §3583(h) to his case violated the *Ex Post Facto* Clause of the Constitution. Pet. App. 1a-2a. The court nonetheless recognized that its decision was directly contrary to the decisions of four other courts of appeals which all concluded that the application of §3583(h) to defendants whose underlying offenses were committed prior to enactment of the statute violated the *Ex Post Facto* Clause. *Id., citing United States v. Lominac*, 144 F.3d 308 (4th Cir. 1998); *United States v. Dozier*, 119 F.3d 239 (3d Cir. 1997); *United States v. Collins*, 118 F.3d 1394 (9th Cir. 1997); and *United States v. Meeks*, 25 F.3d 1117 (2d Cir. 1994).

SUMMARY OF ARGUMENT

The constitutional prohibition on *ex post facto* laws seeks to curb the enactment and enforcement of arbitrary legislation and to assure that individuals have fair warning of the potential legal consequences of their conduct in advance. To constitute an *ex post facto* law, the provision in question, first, must change the legal consequences of acts completed

[3] *See* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796, 2017 (1994).

before its effective date and, second, must disadvantage the offender affected by it.

In this case, the statutory provision in effect at the time of petitioner's original crime in 1993 provided that revocation of supervised release authorized reimprisonment for up to 2 years but without any subsequent renewed supervised release. After petitioner's conviction, but before his violation of supervised release, Congress enacted a new statute providing for renewed supervised release in addition to reimprisonment for violations of supervised release.

Petitioner's resentencing to an aggregate total of thirty months' combined reimprisonment/renewed supervised release exceeded by six months the length of the two years' reimprisonment that was permissible under the statute in effect at the time of petitioner's underlying offense. Supervised release is part of the original sentence, much like parole or probation, and, as such, constitutes as much an integral part of the punishment as actual incarceration. Since the aggregate penalty imposed under the amended statute exceeded the maximum penalty permissible under the statute in effect at the time of the underlying offense, the penalty imposed on resentencing violated the *Ex Post Facto* Clause of the Constitution.

ARGUMENT

THE IMPOSITION OF A RENEWED TERM OF SUPERVISED RELEASE AFTER REVOCATION VIOLATES THE *EX POST FACTO* CLAUSE WHERE THE STATUTE IN EFFECT AT THE TIME OF THE ORIGINAL CRIMINAL OFFENSE DID NOT PROVIDE FOR SUCH A RENEWAL

The Constitution prohibits Congress from passing *ex post facto* laws in the criminal context. U.S. Const., Art. I, §9, Cl. 3; *see also id.*, Art. I, §10, Cl. 1 ("No State shall … pass any … ex post facto Law"). The prohibition against *ex post facto* laws embodies two principle concerns. First, it helps to prevent legislative abuses by curbing the "enact[ment of] arbitrary or vindictive legislation." *Miller v. Florida*, 482 U.S. 423, 429 (1987); *Dobbert v. Florida*, 432 U.S. 282, 293 (1977); *Calder v. Bull*, 3 U.S. (Dall.) 386, 389 (1798); *see also Landgraf v. USI Film Products*, 511 U.S. 244, 266-67 (1994). Second, it helps "to assure that legislative Acts give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed." *Weaver v. Graham*, 450 U.S. 24, 28-29 (1981); *Miller*, 482 U.S. at 430.[4]

In *Miller*, this Court articulated a two-pronged test for determining when application of a statute violates the constitutional prohibition. Before a statute may be said to be an *ex post facto* law, "first, the law 'must be retrospective, that is, it must apply to events occurring before its enactment,' and second 'it must disadvantage the offender

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[4] *See also* Harold J. Krent, *The Puzzling Boundary Between Criminal And Civil Retroactive Lawmaking*, 84 Geo. L.J. 2143, 2173 n.163 (1996)("Drawing the line to prevent retroactive application of any law imposing greater obstacles to an inmate's early release from prison reflects a sensible prophylactic means to prevent vindictive increases of punishment").

affected by it.'" *Miller*, 482 U.S. at 430 (quoting *Weaver*, 450 U.S. at 29).

With respect to retroactivity, "[t]he critical question is whether the law changes the legal consequences of acts completed before its effective date." *Weaver*, 450 U.S. at 31. The "events" and completed "acts" referred to in *Miller* and *Weaver* are the defendant's underlying criminal offenses, whether or not a plea of guilty or a conviction occurred *after* the effective date of the new law. *Weaver*, 450 U.S. at 30; *see also Lynce v. Mathis*, 519 U.S. 433, 441 (1997); *California Dept. of Corrections v. Morales*, 514 U.S. 499, 504 (1995); *Collins v. Youngblood*, 497 U.S. 37, 43, 50 (1990).[5]

Moreover, "one is not barred from challenging a change in the penal code on ex post facto grounds simply because the sentence imposed under the new law was not more onerous than that which he might have received under the old." *Dobbert*, 432 U.S. 432 U.S. at 300; *Miller*, 482 U.S. at 432. Because "the Ex Post Facto Clause looks to the standard of punishment prescribed by the statute, rather than to the sentence actually imposed ... an increase in the possible penalty is ex post facto regardless of the length of the sentence actually imposed ...." *Lindsay v. Washington*, 301 U.S. 397, 401 (1937); *see also Morales*, 514 U.S. at 510 n.6.

In the instant case, of course, the prejudice to petitioner was not merely hypothetical. Under the statutory provisions governing the revocation of supervised release in effect at the time of his original offense in 1993 -- §3583(e)(3) – the district court was authorized to impose two years' reimprisonment following revocation because petitioner's underlying offense was a Class D felony. *See*

[5] In the instant case, petitioner's original crime, plea and sentence all predated the effective date of newly-enacted §3583(h) – September 13, 1994. Only the revocation violations occurred after that date.

Cert. Opp. 8-9.[6] Here, petitioner was resentenced to a term of 18 months' reincarceration to be followed by a twelve-month period of renewed supervised release. In other words, petitioner was resentenced to a combined "package" totalling thirty months of reimprisonment/renewed supervised release where he could have been sentenced to a total of only 24 months' imprisonment *simpliciter* under the statutory provision in effect at the time he committed his underlying criminal offense.

Statutes that alter the consequences of violations of parole, probation or supervised release, as applied to prisoners or parolees whose underlying offenses occurred prior to passage of the statutes, have consistently been held to violate the *Ex Post Facto* Clause because the increased burden imposed operates to enhance the penalty for the underlying offense. *See* Ryan M. Zenga, Note, *Retroactive Law Or Punishment For A New Offense? – The Ex Post Facto Implications Of Amending The Statutory Provisions Governing Violations Of Supervised Release*, 19 W. New Eng. L. Rev. 499 (1997). *See also Meeks*, 25 F.3d at 1120 (discussing *Greenfield v. Scafati*, 277 F.Supp. 644, 645-46 (D. Mass. 1967)(three-judge court), *affd mem.*, 390 U.S. 713 (1968)[7]).

Supervised release, like parole, is an integral part of the punishment for the underlying offense:

> Under each, a defendant serves a portion of a sentence in prison and a portion under supervision

[6] Section 3583(h) expanded revocation penalties for Class D felonies beyond the two years' reimprisonment provided in §3583(e)(3) by explicitly allowing the district court to tack on an additional term of one year's renewed supervised release. *See Dozier*, 119 F.3d at 241-42.

7 This Court's summary affirmance in *Greenfield* constitutes an affirmance on the merits. *Meeks*, 25 F.3d at 1120 (*citing Hicks v. Miranda*, 422 U.S. 332, 344 (1975)).

> outside prison walls. If a defendant violates the terms of his release, he may be incarcerated once more under the terms of his original sentence. More specifically, a defendant's original sentence determines the length of the term of parole (indirectly) or supervised release (directly). It is also the original sentence that establishes how long the defendant may be required to serve following revocation of both parole and supervised release.

United States v. Paskow, 11 F.3d 873, 881 (9th Cir. 1993); *see also id.* at 883 (supervised release is "simply part of the whole matrix of punishment which arises out of a defendant's original crimes").

Sentencing petitioner pursuant to §3583(h) rather than §3583(e) thus affected the resentencing to which he was subject in at least two important respects. First, it allowed imposition of a new term of supervised release, whereas prior to §3583(h) petitioner would have been free of all supervision following whatever reincarceration the district court imposed. Second, it allowed the court to impose a "total package" of penalties stretching to 30 months – rather than only 24 months – the maximum period of incarceration authorized under §3583(e)(3). These effects of §3583(h) thus "increase the penalty" to which petitioner is subject. As the Third Circuit noted in precisely this context (*Dozier*, 119 F.3d at 242-43):

> Supervised release is punishment; it is a deprivation of some portion of one's liberty imposed as a punitive measure for a bad act. A defendant on supervised release is subject to various terms and conditions which restrict his freedom and make him vulnerable to further punishment should he violate them. Such subsequent punishment may again include more imprisonment and more supervised release. The length of the "total package", therefore,

> is the length of time the defendant suffers either a total or substantial deprivation of his liberty. It is the measure of the period to which he is subject to government supervision. Increasing that length from a maximum of 24 months to a maximum of 36 months clearly increases the penalty authorized upon revocation of supervised release.

In *Lynce v. Mathis*, 519 U.S. at 443, this Court reiterated its earlier holdings in *Collins* and *Morales* that while "speculative and attenuated possibilities" of increasing the measure of punishment do not implicate *ex post facto* concerns, any increase in the "quantum of punishment" or the length of the penalty by which a crime is punishable runs afoul of the prohibition against *ex post facto* laws. *See also Lominac*, 144 F.3d at 312-15.

In this case, prejudice to petitioner is neither speculative nor attenuated. On revocation of his original term of supervised release, he was resentenced to a "total package" of reincarceration/renewed supervision that exceeded by six months the total length of the revocation penalty to which he was originally subject at the time of his underlying crime, plea and original sentence. Accordingly, he has made out an actionable violation of his rights under the *Ex Post Facto* Clause of the Constitution. *Lominac*, 144 F.3d at 313-14.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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